

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

HEALTH MIDWEST, A Missouri
nonprofit public benefit corporation,

Plaintiff,

v.

JEREMIAH W. (JAY) NIXON, in his
official capacity as the Attorney General
for the State of Missouri,

Defendant.

Serve: Office of the Attorney General
Missouri Supreme Court Building
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102

Case No. 02CV-326118

Court No. I (Brown)

PETITION FOR DECLARATORY JUDGMENT

Comes now Plaintiff Health Midwest, for its petition seeking a Declaratory Judgment, and alleges the following against Jeremiah W. Nixon (the "Attorney General"), in his official capacity as the Attorney General for the State of Missouri. In support of its petition, Health Midwest states:

1. Health Midwest is a nonprofit, public benefit corporation duly organized and validly existing in good standing under the laws of the State of Missouri. Health Midwest owns and operates thirteen general acute care and behavioral health centers in Kansas and Missouri.

2. The Defendant is the Attorney General of the State of Missouri and may be served at his office located on the first floor of the Missouri Supreme Court Building, 207

W. High Street, P.O. Box 899, Jefferson City, Missouri, 65102.

3. Jurisdiction is proper in this Court based on Mo. Rev. Stat. § 527.010 because Health Midwest seeks a declaration that: (A) the conflicting statements of the Attorneys General of Missouri and Kansas and members of the public attempting to exercise authority over the proceeds of the sale create a conflict that cannot be resolved absent judicial intervention; (B) the sale price of Health Midwest assets is reasonable, negotiated by the Board of Directors of Health Midwest (the "Board") in good faith and within its valid exercise of authority and in the best interests of Health Midwest; (C) the Board followed a reasonable and informed process in good faith and within its valid exercise of authority in reaching the decision to sell Health Midwest assets, and the Board undertook such process in the best interests of Health Midwest; and (D) the intended use of proceeds from the sale of Health Midwest assets is reasonable, within the purposes set forth in the Health Midwest Articles of Incorporation and in the best interests of Health Midwest; (E) the Attorney General of Missouri has exceeded his authority by attempting to exercise control over the disposition of proceeds from the sale. See also Mo. R.C.P. 87.01 ("No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for,"); Teat v. Director of Revenue, 806 S.W.2d 754, 757 (Mo. Ct. App. 1991) (Declaratory judgment statute must be interpreted liberally as remedial law affording relief from uncertainty.)

4. Venue is appropriate in this Court because actions against executive heads of departments of state government lie generally in the county in which their offices are located and their principal official duties are performed. State of Missouri v. Cook, 365 Mo. 274, 279, 281 S.W.2d 777, 780 (Mo. banc 1955); State of Missouri ex rel. Spradling v.

Bondurant, 501 S.W.2d 527, 529 (Mo. Ct. App. 1973). The Attorney General's office is located in Cole County, Missouri and he conducts his principal official duties from that location, as required by Missouri law. Mo. Const. Art. IV, § 20; Mo. Rev. Stat. § 27.010.

5. Health Midwest has standing to pursue this action based on Mo. Rev. Stat. § 527.020, which provides that:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

See also Mo. R.C.P. 87.02 (setting out identical language). Health Midwest's rights to conduct its business as a nonprofit corporation and its legal relations with other corporate entities have been and continue to be challenged by statements propounded by the Attorney General.

6. These statements by the Attorney General mirror similar statements made by the Attorney General of the State of Kansas, who claims alleged authority under Kansas law to disapprove the Health Midwest sale and dictate how the proceeds of any sale are allocated and thereby substituting her own judgment for the decisions made by the Board. Even if it was required to do so, which it is not, Health Midwest could not satisfy all of the conflicting demands made by the Attorneys General of Missouri and Kansas or by others.

ALLEGATIONS COMMON TO ALL COUNTS

Financial Challenges Facing Health Midwest

7. In or around May 2001, the Board initiated a performance improvement plan to address, among other issues, significant financial challenges facing Health Midwest.

Cap Gemini, a nationally recognized health care consultant, analyzed these financial challenges and prepared a detailed study of its findings and conclusions.

8. The Cap Gemini study confirmed that Health Midwest was experiencing diminished reimbursement for services, reduced availability of capital for maintenance and expansion, increased competition for services rendered to insured patients, physician and personnel shortages, adverse relationships with certain lenders and increasing difficulty obtaining insurance.

9. Absent a solution, Health Midwest consultant Cap Gemini projected the system would suffer a net operating loss of \$75 million by 2004.

10. To address its immediate financial challenges, the Board embarked on an aggressive program, called "Project Delta," to identify and eliminate duplicative and other non-essential costs. Through "Project Delta," Health Midwest combined certain redundant operations, closed redundant facilities and engaged in other cost cutting strategies. Despite these efforts, Health Midwest lacked access to necessary capital to maintain and improve the system's infrastructure.

11. Rather than permitting Health Midwest to deteriorate from lack of resources and capital, the Board considered numerous alternatives to meet its long-term financial challenges, including merger with a not-for-profit partner, merger with a local hospital system, divestiture of part or all of the Health Midwest system back into community hospitals, renegotiation of certain agreements and debt obligations, a joint venture with a for profit partner and sale of assets to a for profit buyer.

Events Precipitating Asset Purchase Agreement

12. In early 2002, Health Midwest received unsolicited expressions of interest from entities contemplating the purchase of all assets owned by Health Midwest.
13. After reviewing these expressions of interest, the Board evaluated them and determined that each was legitimate.
14. In July of 2002, the Board engaged financial advisor Ponder & Company ("Ponder"), an organization experienced in hospital mergers and acquisitions, to assist Health Midwest in designing the formal bid process for the possible sale of Health Midwest's assets and to evaluate the bids when received.
15. On or about August 6, 2002, and with the advice of independent financial and legal advisors, the Board approved a process to receive and review formal bids from entities interested in the purchase of Health Midwest assets.
16. During August 2002, in addition to the interest expressed by certain potential for-profit bidders, Ponder identified and contacted certain not-for-profit health care systems which Ponder believed were likely to have an interest in and be capable of submitting a competitive bid for Health Midwest's assets. In addition to the amount of money to be paid for Health Midwest's assets, each bidder was required to state its positions on various operating covenants Health Midwest sought to be included in a contract for the sale of its assets, including those designed specifically to ensure a continuation of top quality health care to the communities served by Health Midwest's hospitals.
17. As a result of this process, the Board received four bids from potential buyers on or about September 5, 2002.

18. Following a review of the bids submitted, the Board on or about September 10, 2002, decided to focus its discussions with HCA and Tenet.

19. During September 2002, members of the Board visited hospitals owned and operated by HCA and Tenet, spoke with HCA and Tenet employees, physicians and board members and evaluated the corporate citizenship of HCA and Tenet in communities where the entities purchased nonprofit hospitals. The Board conducted this due diligence to determine the reputation, commitment and experience of HCA and Tenet in delivering compassionate and quality health care and in otherwise serving the needs of the communities where they operated. In addition, the Board sought to determine whether HCA and Tenet had honored the commitments they had made to the communities.

20. HCA and Tenet submitted their final bids and formal offers for the purchase of Health Midwest assets on or about October 8, 2002.

21. On or about October 15, 2002, the Board determined to negotiate exclusively with HCA in an attempt to enter into a definitive Asset Purchase Agreement. HCA offered a higher purchase price. Based on this determination and other factors, the Board made the reasonable and informed decision to negotiate exclusively with HCA with the intent of reaching a final agreement for sale of Health Midwest assets.

Asset Purchase Agreement

22. On November 22, 2002, Health Midwest entered into an Asset Purchase Agreement (the "Agreement") with HCA's wholly owned subsidiary HM Acquisition, LLC (the "Buyer"). HCA guaranteed the performance of each and every covenant, obligation and agreement undertaken by the Buyer arising out of, connected with or related to the

Agreement, including the continuation of services previously provided by Health Midwest.

23. Under the Agreement, Health Midwest will convey at closing the purchased assets of Health Midwest to the Buyer in exchange for \$1,125,000,000 (subject to certain purchase price adjustments) (the "Sale Price") and the Buyer's agreement to assume a large portion of Health Midwest's liabilities. Health Midwest will not accept any equity in Buyer or HCA, nor will Health Midwest finance any part of the sale.

24. The Agreement includes several operating covenants, insisted upon by Health Midwest, which provide for the benefit of the communities served by the hospitals and provide that the Buyer shall:

- (A) Not close any hospitals in the urban core (Research Medical Center, Baptist Lutheran Medical Center, and Research Psychiatric Center) for three years and during the same period not close any other hospitals previously operated by Health Midwest unless the Buyer avails the community to the same or substantially similar health care services within 8 miles of the closed hospital through either a newly constructed facility or an expanded existing facility.
- (B) Not terminate or change in any material way a substantial service, program, type or level of care offered at any hospitals previously operated by Health Midwest for a period of three years unless in connection with a closure permitted under Paragraph 23(A).
- (C) Not close the emergency department of any hospital for a period of five years unless in connection with a closure permitted under paragraph 23(A).
- (D) Maintain for a period of ten years at least the same aggregate dollar amount of charity, indigent and other uncompensated care as were provided by the Health Midwest system during the 12-month period prior to closing of the Agreement.
- (E) Participate for a period of ten years in the Medicare and Medicaid programs at each hospital consistent with the participation of

Health Midwest entities prior to the closing.

- (F) Make available to Kansas City residents up to \$1 million in nursing and other health related scholarships.
- (G) Offer employment to all existing employees at wages and salaries at least equal to those paid by Health Midwest and at benefit levels offered by Buyer and HCA to existing employees, recognizing existing seniority and granting credit for years of service with Health Midwest under the employee benefit plans of Buyer and HCA.
- (H) Maintain the medical staff membership and clinical privileges of all physicians in good standing on the medical staff of a Health Midwest hospital as of the date of closing.
- (I) Maintain for a period of ten years the religious and cultural identity and traditions of each of the hospitals and maintain the name of each hospital as it exists as of the date of closing. Thereafter, such traditions will be maintained until, if ever, the medical staff, the community board of the hospital and the communities served by the hospital no longer support such operation and name.
- (J) Maintain community boards at each hospital consisting of local community members and medical staff that are racially and ethnically diverse and that will have the authority over medical staff issues and will be consulted on budgeting and strategic planning.
- (K) Maintain compliance programs to prevent and detect violations of laws governing the delivery of health care goods and services in order to maintain the ethical integrity of the hospitals.
- (L) Implement diversity initiatives for employment and purchasing activities consistent with such initiatives at other hospitals operated by Buyer and HCA.
- (M) Implement as safety initiatives electronic medication administration systems and electronic physician order-entry systems, including bar code confirmation of medication administration.

- (N) Work with the Federal Emergency Management Agency to offer to sponsor a DMAT team or support any team in the Kansas City area.
- (O) Buyer must report compliance with these covenants on an annual basis to Health Midwest and Health Midwest retains certain enforcement rights in the event of Buyer's breach of any of these covenant's including indemnification rights and any other rights at law or equity.

25. In addition to the \$1,125,000,000 sale price, HCA has further pledged, at Health Midwest's demand, to commit \$450,000,000 for capital improvements to the purchased hospitals and has stated that it will likely continue to provide the extensive charitable and uncompensated care past the term of the covenants in the Agreement.

Actions and Statements of the Attorney General

26. As a corporation organized under Chapter 355 of the Missouri Revised Statutes, the Board has the power to do all things necessary and convenient to carry out the affairs of Health Midwest including, without limitation, the power to make contracts and to sell, convey, and otherwise dispose of all or any part of its property.

27. As a Missouri nonprofit public benefit corporation, Health Midwest has the authority to sell its assets other than in the ordinary course of business on the terms and conditions and for the consideration determined by the Board.

28. The current members of the Board are successors to the prior Health Midwest Board members, all of whom are collectively responsible for the creation, growth and maintenance of the Health Midwest system. With the exception of the CEO who serves as a director, the Board serves voluntarily and without compensation, none of the Board members who have participated in the negotiation and have authorized and approved the asset purchase

agreement will personally benefit from any aspect of the sale, and none of the Board members have any conflict of interest in regards to the sale.

29. Under Missouri law the Attorney General's authority to review the sale of Health Midwest's assets is limited to the following:

- 1) Determining that the Board was not conflicted when it approved the sale,
- 2) Determining that no person or for-profit corporation will receive any assets of Health Midwest except in exchange for fair market value, and
- 3) Determining that the decision of the Board to sell Health Midwest assets was made in compliance with the business judgment rule.

30. The Attorney General has stated that the scope of his review of the sale of Health Midwest's assets includes an analysis of the transaction under principals of law governing charitable trusts, rather than the principals of law governing Missouri nonprofit corporations. The Attorney General has also indicated that the scope of his review of the sale gives him authority to dictate to the Board how the cash acquired in the sale must be allocated.

31. The Attorney General has also stated that the assets of Health Midwest are public assets, which has no basis in and is in fact contrary to existing law.

32. The actions of the Attorney General have adversely affected, and continue to affect, Health Midwest's ability to conduct its ongoing business and operations and, most importantly, its ability to consummate the sale of assets.

33. Health Midwest has a legally protectable interest in conducting its business free from the effects of actions and claims for which there is no authority under applicable law.

34. Missouri law does not grant the Attorney General any right to veto a proposed asset sale by Health Midwest. The Attorney General's review of the Board's corporate decision must be limited to the parameters set forth in Paragraph 29.

35. This controversy is substantial and the interests of Health Midwest and the Attorney General are genuinely adverse.

36. According to the Agreement, the sale by Health Midwest to HCA must be completed as soon as possible in order to guarantee payment of the full contract price of \$1,125,000,000.

37. If the sale is not completed by March 31, 2003, HCA has the right to terminate the contract entirely.

38. This issue is ripe for review because the actions and statements of the Attorney create uncertainty as to the rights and duties of the Board as it relates to a sale of Health Midwest assets. Further, because of the short time frame under the Agreement, the great potential for loss to Health Midwest and the community if the sale is needlessly delayed, and because the facts necessary to adjudicate the underlying claims in this case are fully developed and the interpretation of the laws at issue give rise to an immediate, concrete dispute, the case is ripe for review. See Missouri Health Care Ass'n v. Attorney General of the State of Missouri, 953 S.W.2d 617, 621 (Mo. banc 1997).

COUNT I
DECLARATORY JUDGMENT
(Jurisdiction of the Attorney General)

39. Health Midwest restates and realleges the allegations set forth

in Paragraphs 1-38 of the Petition as if restated in the following paragraphs word for word.

40. Health Midwest is a nonprofit corporation whose operation is entrusted by Missouri law to the Board of Directors.

41. Missouri law does not grant the Attorney General the authority to veto a sale of assets by a nonprofit corporation like Heath Midwest.

42. While Missouri law does provide that the Attorney General must have notice of such a sale, the statute does not grant the Attorney General any right to review the transaction beyond the scope set forth in Paragraph 29.

43. As a nonprofit corporation under Missouri law, the decision of the Board should be subject to review only to the extent enumerated in Paragraph 29.

44. The Attorney General has no basis to contend that the Board intends to use the proceeds of the sale in any manner inconsistent with its valid, authorized purposes. Nevertheless, the Attorney General improperly contends that he has the power to dictate the manner in which the proceeds of the sale will be used.

45. The Attorney General's actions and statements threaten to injure Health Midwest and the community by denying them the benefit of the bargain reached with HCA.

46. The Attorney General's actions and statements has exceeded the authority granted to him under Missouri law and have and will continue to cause Health Midwest immediate and irreparable harm for which there is no adequate remedy at law.

47. This Court's judgment will settle the actual controversy and afford relief from the uncertainty created by the Attorney General's actions.

WHEREFORE, plaintiff Health Midwest respectfully requests an Order of this